International Union of Operating Engineers, Local 150, AFL-CIO *and* D. H. Johnson Company and Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL-CIO, Party of Interest. Case 13-CD-304

29 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

Upon a charge filed 2 September 1981 by D. H. Johnson Company, herein the Employer, and duly served on International Union of Operating Engineers, Local 150, AFL-CIO, herein the Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 13, issued a complaint and notice of hearing dated 9 September 1982 against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(D) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing were duly served on the parties.

The complaint alleges that since on or about 17 August 1981, and continuing to date, the Respondent has demanded that the Employer assign certain work in dispute to employees represented by the Respondent rather than to employees represented by Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL-CIO, herein the Union.[1] The complaint also alleges that, on 23 August 1982, the Respondent stated in writing that under no circumstances would it comply with the Board's Decision and Determination of Dispute[2] in the underlying 10(k) proceeding, which awarded the disputed work to employees represented by the Union. Additionally, the complaint alleges that commencing on or about 27 August 1981, and continuing until on or about 11 September 1981, the Respondent picketed the Employer at its Centennial construction project in Mount Prospect, Illinois, with the effect of inducing and encouraging individuals employed by the Employer to strike or refuse in the course of their employment to use, manufacture, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services. The complaint also alleges that the Respondent has threatened, coerced, and restrained the Employer and other persons engaged in commerce or in industries affecting commerce. The Respondent filed its answer to the complaint, dated 1 November 1982, in which it admitted in part, and denied in part, the allegations in the complaint. The Respondent admits therein that it failed and refused to comply with the Board's 10(k) Determination of Dispute, but claims that the Board lacked jurisdiction to make a work award in the first instance because all parties were bound to a voluntary dispute resolution mechanism. The Respondent also admits having picketed the Employer from on or about 24 August 1981 to on or about 11 September 1981, but asserts that its picketing was legal, economic picketing conducted in connection with a dispute against the Employer and other employers over the terms and conditions of a new collective-bargaining agreement. Furthermore, the Respondent denies in its answer that, since on or about 17 August 1981, it has demanded that the Employer assign the disputed work to employees represented by the Respondent rather than to employees represented by the Union.

As of 28 October 1982 the parties entered into a stipulation and moved to transfer the proceeding to the Board. The parties agreed that the stipulation, along with the charge in Case 13-CD-304, the complaint and notice of hearing in Case 13-CD-304, the entire record of the 10(k) proceeding in Cases 13-CD-303 and 13-CD-304,[3] the order scheduling hearing in Case 13-CD-304, the Respondent's answer in Case 13-CD-303, and order postponing hearing in Case 13-CD-304 constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. They waived a hearing, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and submitted the case for findings of fact, conclusions of law, and an appropriate order directly to the Board.

On 10 February 1983 the Board approved the stipulation, made it a part of the record, and transferred to and continued the proceeding before the Board for the purpose of making findings of fact and conclusions of law for the issuance of a deci-

[1] We note that par. V(b) of the complaint inadvertently alleges that the Respondent has demanded that the Employer assign the work in dispute to employees represented by the Union rather than to employees represented by the Respondent. We would read par. V(b) like par. VIII of the complaint, which correctly denotes that the Respondent sought the work for its own members, not for employees represented by the Union.

[2] *Laborers Local 118 (D. H. Johnson Co.)*, 262 NLRB 1147 (1982).

[3] The parties agreed that the entire record of the 10(k) proceeding in Cases 13-CD-303 and 13-CD-304 consists of Board Exhs. 1(a) through 1(i); C.P. Exhs. 1 through 3; Resp. Exhs. 1 through 11; the Party of Interest's Exh. 1; the hearing transcript; the hearing officer's report; the Employer's, the Respondent's, and the Party of Interest's briefs to the Board; the Board's prior Decision and Determination of Dispute; the Respondent's motion for reconsideration; and the Employer's response to the motion for reconsideration.

sion and order. Thereafter, the General Counsel and the Respondent filed briefs with the Board.

The Board has considered the stipulation, the briefs, and the entire record, and hereby makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation duly organized under and existing by virtue of the laws of the State of Delaware, with its principal place of business in DuPage County, Illinois, where it is engaged in the business of brick masonry as a construction subcontractor. In the calendar or fiscal year preceding issuance of the Board's Decision and Determination of Dispute in the underlying 10(k) proceeding, the Employer had gross revenues in excess of $500,000 and purchased goods and materials from outside the State of Illinois which it received at its worksites within the State of Illinois having a value in excess of $50,000.

We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS

We find that Operating Engineers Local 150 and Laborers Local 118 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

Pursuant to its agreement with the Construction and General Laborers' District Council of Chicago and Vicinity and consistent with its desires, the Employer assigned the operation of the forklift on its Mount Prospect, Illinois project to employees represented by the Union by letter dated 17 August 1981. The Respondent then threatened to picket the jobsite unless the forklift work being performed by employees represented by the Union was reassigned to employees represented by the Respondent. The Respondent began picketing on 27 August 1981, and the picketing continued for approximately 2 weeks. In a letter dated 2 September 1981, the Union informed the Employer that it would engage in picketing if the Employer reassigned the forklift work in any manner inconsistent with the then-current assignment of the same to those employees represented by the Union. On 2 September 1981 the Employer filed 8(b)(4)(D) charges against the Union and the Respondent in Cases 13-CD-303 and 13-CD-304, respectively.

On 14 September 1981 the Respondent requested a hearing before the Joint Conference Board (the JCB) regarding the Employer's assignment of the disputed forklift operation to employees represented by the Union. The declared purpose of the JCB is to act as mediator in disputes arising at jobsites in Cook County, Illinois, where the Employer's Mount Prospect project is located, concerning trade agreements between particular unions and associations. The JCB awarded the work in dispute to employees represented by the Respondent.

On 22 July 1982, after conducting a hearing pursuant to Section 10(k) of the Act, the Board issued its Decision and Determination of Dispute. The Board stated therein that it was undisputed that the Respondent picketed the Centennial project site, and then found that such picketing was to protest the Employer's assignment of the disputed work to employees represented by the Union. Moreover, the Board stated that it was undisputed that the Union threatened to picket the project if the Employer were to reassign the disputed work to the employees represented by another union. Thus, the Board concluded that there was reasonable cause to believe that Section 8(b)(4)(D) of the Act had been violated.

The Board also concluded that there was no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. The Board stated that, assuming arguendo that the Respondent, the Union, and the Employer all could be found to be bound to the use of the JCB for resolution of jurisdictional work disputes, the existence of the equally binding, but conflicting, work dispute provision in another agreement to which the Employer was bound[4] precluded a finding of a determinative, agreed-upon method of dispute resolution in the case. Accordingly, the Board concluded that the dispute was properly before it for determination and based on the factors of economy, efficiency, and employer preference, the Board awarded the work in dispute to the employees of D. H. Johnson Company who were represented by the Union. The Board also found, inter alia, that the Respondent was not entitled to force or require D. H. Johnson Company to assign the work to employees it represented by means proscribed by Section 8(b)(4)(D) of the Act.

[4] As described more fully in sec. III,B, infra, of this Decision and Order, the Employer, as a member of another employer association (the MCAA), was subject to an agreement between the MCAA and the Laborers' International Union of North America, AFL-CIO, which contained an equally binding, but conflicting, work dispute provison and which obligated its parties to submit jurisdictional disputes to the International office of the Union for resolution and indicated that such procedure was exclusive and superseded any other procedure delineated in an agreement between a member of the MCAA and any local union.

The decision further directed the Respondent to notify the Regional Director for Region 13, in writing, within 10 days, whether it would refrain from the proscribed action. The Respondent has failed and refused to comply with the Board's Decision and Determination of Dispute.

The Respondent filed a motion for reconsideration of the Board's initial Decision and Determination of Dispute on 18 August 1982, and thereafter stated in writing on 23 August 1982 that it would not, under any circumstances, comply with the Board's Order. On 16 December 1982 the Board denied the Respondent's motion for reconsideration as lacking in merit.

B. *Discussion*

The Respondent, in its brief, asserts that it does not contest the Board's award of the work in dispute to employees represented by the Union on the merits, but rather contends that the Board erred, in the first instance, in making a determination in the 10(k) proceeding because there was an agreed-upon method of dispute resolution. More particularly, the Respondent asserts that the Board erred in concluding that the Employer was committed to the use of two "equally binding, but conflicting" work dispute resolution provisions, thus precluding a finding of an agreed-upon method of dispute resolution. The Respondent contends that the Employer, as well as the Respondent and the Union, was obligated to submit jurisdictional work disputes to the Joint Conference Board (JCB) for resolution. Furthermore, the Respondent claims that the dispute resolution mechanism enunciated in the MCAA—Laborers' International agreement, which the Board found to be "equally binding, but conflicting" is inapplicable in the instant case. Although the Employer is an admitted member of the employer association MCAA, the Respondent contends that the absence of any collective-bargaining agreement between the Employer and Laborers Local 118 (the Union) involved in this dispute renders the dispute resolution provision in the MCAA—Laborers' International agreement inapplicable. The Respondent also claims that the Board's acknowledgement of this jurisdictional work dispute provision gives credence to an agreement between the Employer and a *nonparty* to this dispute. We find no merit in the Respondent's contention because it raises an argument which was considered previously by the Board.[5]

With the exception of the Respondent's claim with regard to the nature of its picketing, all affirmative defenses raised by the Respondent in its answer have been litigated previously. "It is settled that issues raised and litigated in a 10(k) proceeding may not be relitigated in a subsequent unfair labor practice proceeding, alleging violations of Section 8(b)(4)(D) which are based in part on factual determinations made in the 10(k) proceeding."[6]

With regard to the picketing, the Respondent claims that its members engaged in lawful, economic picketing at the Employer's construction project. The Respondent contends that the members whom it represents engaged in an economic strike against various employers, including the Employer, from 20 July 1981 to 16 September 1981, over the terms and conditions of a new collective-bargaining agreement. In its Decision and Determination of Dispute, however, the Board concluded that such picketing was engaged in to protest the Employer's assignment of the disputed work to employees represented by the Union. The Respondent has presented no evidence to demonstrate that the Board's factual finding was erroneous. Because all material allegations either have been admitted by the Respondent in its answer, or have been decided previously by the Board, there are no matters outstanding for resolution.[7]

Having determined that the Respondent has not complied with the Board's 10(k) determination, the merits of the complaint concerning whether the Respondent has engaged in conduct violative of Section 8(b)(4)(D) of the Act must be examined.

It should be noted that the Respondent's failure to comply with the Board's 10(k) determination does not per se constitute a violation of Section 8(b)(4)(D). Rather, noncompliance merely triggers a complaint alleging that a violation of Section 8(b)(4)(D) has occurred. Once the complaint has issued "in the Section 8(b)(4)(D) proceeding itself, the Board must find by a preponderance of the evidence that the picketing union has violated Section 8(b)(4)(D)."[8] All the factors essential for a finding of such a violation are present in the instant case. As set forth above, the Respondent picketed the Employer; by such conduct, the Respondent induced and encouraged the Employer's employees to engage in a strike or a refusal in the course of their employment to use, manufacture, transport, or othewise handle or work on any goods, articles,

[5] See *Teamsters Local 528 (National Homes Corp.)*, 255 NLRB 208, 209 (1981); *Teamsters Local 445 (Blount Bros. Corp.)*, 197 NLRB 46 (1972), and cases cited therein at 51 fn. 5.

[6] *Ironworkers Local 433 (Plaza Glass Co.)*, 218 NLRB 848, 849 (1975), enfd. 549 F.2d 634 (9th Cir. 1977).

[7] *Longshoremen ILA Local 1410 (Employer-Members of Mobile Steamship Assn.)*, 237 NLRB 1283 (1978).

[8] *NLRB v. Plasterers Local 79 (Texas State Tile)*, 404 U.S. 112, 116 fn. 10 (1971).

materials, or commodities or to perform services, and threatened, coerced, and restrained the Employer and other persons engaged in commerce or industries affecting commerce; the picketing's object was to force the Employer to assign the forklift operation to members of the Respondent rather than to members of the Union; and the Respondent has not been certified by the Board as the collective-bargaining representative of the employees performing the forklift operation, nor has the Board issued any order determining that the Respondent is the bargaining representative of these employees. On the basis of the foregoing and the entire record in this proceeding, we find by a preponderance of the evidence that the Respondent violated Section 8(b)(4)(i) and (ii)(D) of the Act.

CONCLUSIONS OF LAW

1. D. H. Johnson Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent Operating Engineers Local 150 is a labor organization within the meaning of Section 2(5) of the Act.
3. By picketing the Employer, the object of which was to force or require the Employer to assign the operation of a forklift used by the Employer at the apartment construction project at 900 East Centennial Drive in Mount Prospect, Illinois, to employees represented by the Respondent, rather than to employees represented by the Union, the employees represented by the Respondent not being lawfully entitled to that work, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.
4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order it to cease and desist therefrom and take affirmative actions designed to effectuate the purposes of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, International Union of Operating Engineers, Local 150, AFL-CIO, Countryside, Illinois, its officers, agents, and representatives, shall

1. Cease and desist from picketing D. H. Johnson Company, the object of which is to force or require D. H. Johnson Company to assign the forklift work at the Employer's East Centennial Drive apartment construction project in Mount Prospect, Illinois, to employees represented by the Respondent rather than to employees represented by Construction and General Laborers' Local 118, Laborers' International Union of North America, AFL-CIO, except insofar as such conduct is permitted under Section 8(b)(4)(i) and (ii)(D) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 13 for posting by D. H. Johnson Company, if it is willing, at all locations on the jobsite where notices to its employees customarily are posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT picket D. H. Johnson Company with an object of forcing or requiring D. H. Johnson Company to assign employees of D. H. Johnson Company represented by International Union of Operating Engineers, Local 150, AFL-CIO, rather than employees of D. H. Johnson Company represented by Construction and General Laborers'

Local 118 Laborers' International Union of North America, AFL-CIO, the forklift operation at the Employer's East Centennial Drive apartment construction project in Mount Prospect, Illinois, except insofar as such conduct is permitted under Section 8(b)(4)(i) and (ii)(D) of the Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO